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IN THE

Supreme Court of the United States

SUE EVENWEL, *ET AL.*,
Appellants,
v.
GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF FORMER DIRECTORS OF THE U.S. CENSUS BUREAU AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are former directors of the U.S. Census Bureau. As former directors responsible for administering the U.S. Census, *amici* have a unique and valuable perspective on the practical implications of the rule proposed by Appellants and the limitations of the data on which such a rule would necessarily rely. In *amici*'s view, serious practical concerns counsel against adopting Appellants' proposals to require states to draw districts with equal numbers of either voting age citizens or registered voters.

Amicus curiae Dr. Kenneth Prewitt was the Director of the U.S. Census Bureau from 1998 to 2001. In that capacity, he oversaw the execution of the 2000 decennial Census and development of the American Community Survey. Currently, Dr. Prewitt serves as the Carnegie Professor of Public Affairs and Special Advisor to the President at Columbia University, where he teaches and writes on issues related to the intersection of the Census, politics, and statistics. Prior to serving as Director of the Census, Dr. Prewitt served as Director of the National Opinion Research Center, President of the Social Science Research Council, and Senior Vice President of the Rockefeller Foundation. Dr. Prewitt has considerable knowledge and experience with the use and limitations of Census data and their effect on the political system.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

Amicus curiae Dr. Robert Groves was the Director of the U.S. Census Bureau from 2009 to 2012. During his tenure, he oversaw the 2010 decennial Census and implementation of the American Community Survey. Currently, Dr. Groves is the Executive Vice President and Provost of Georgetown University, where he also serves as a professor in the Math and Statistics Department as well as the Sociology Department. Prior to serving as Director of the Census Bureau, Dr. Groves was a professor at the University of Michigan and Director of its Survey Research Center, and before that a research professor at the University of Maryland's Joint Program in Survey Methodology. Dr. Groves has written extensively on the mode of data collection and its effect on responses, the social and political influences on survey participation, and the effect of privacy concerns on Census data collection. He has significant knowledge and experience related to the use and limitations of Census data and their effect on the political system.

Amicus curiae Dr. Martha Farnsworth Riche was the Director of the U.S. Census Bureau from 1994 to 1998. In that capacity, she oversaw the design of the 2000 decennial Census, as well as the new American Community Survey. Currently, Dr. Riche is affiliated with the Cornell Population Center at Cornell University, and participates in research projects with various Washington-based organizations, most recently on issues of demographic concern to the U.S. military. Prior to serving as Director of the Census Bureau, Dr. Riche directed policy studies for the Population Reference Bureau, and was a founding editor of American Demographics magazine. Dr. Riche has

considerable knowledge and experience with the use and limitations of Census data across the public, private, for profit, and not-for-profit sectors.

Amicus curiae Vincent P. Barabba was the Director of the U.S. Census Bureau from 1973 to 1976 and from 1979 to 1980—the only director to be appointed by presidents of both political parties. After serving as Director of the Census Bureau, Dr. Barabba was appointed by Presidents Reagan and George H.W. Bush to be the U.S. Representative to the Population Commission of the United Nations. He has also served on the board of directors for the Marketing Science Institute, the American Institutes for Research, and the National Opinion Research Center of the University of Chicago. In recognition of his performance in the private and public sectors he has received: An Honorary Doctorate of Laws degree from the Trustees of the California State University, been Inducted into the Market Research Council Hall of Fame, and was awarded The Certificate of Distinguished Service for Contribution to the Federal Statistical System from the Office of Management and Budget. Currently, Dr. Barabba is a member of the California Citizens Redistricting Commission. He has a demonstrated interest in both accurate population statistics and redistricting.

SUMMARY OF ARGUMENT

In order to comply with the equal protection principle of one-person, one-vote, nearly all states and jurisdictions redistrict using total population data based on counts from the most recent decennial U.S. Census. Appellants urge the Court to overthrow this long-settled practice and replace it with one of the two voter-based measures of population they propose—citizen voting age population or registered voters. Beyond the legal and policy flaws with Appellants' argument, serious practical concerns counsel against adopting either of their proposed metrics as a constitutionally mandated means of complying with the one-person, one-vote principle.

As an initial matter, there is no actual count of the number of voting age citizens. In keeping with the manner the Constitution provides for apportioning seats in the U.S. House of Representatives among the states, the Census Bureau counts the number of persons in each state. The Census Bureau does not count the number of citizens. The only voting age citizen data that exists are estimates based on a continual sampling conducted as part of the American Community Survey ("ACS") by the Census Bureau. But ACS was not designed with redistricting in mind. The timing of ACS estimates does not align with the timing of redistricting and ACS estimates are not reported at the small geographic levels redistricters normally use to build districts. Moreover, the geographic areas at which such estimates are available carry large error margins because of the small sample sizes. These factors make the ACS an inappropriate

source of data to support a constitutional rule requiring states to create districts with equal numbers of voting age citizens.

Nor is it possible to accurately obtain a count of voting age citizens by inquiring about citizenship status as part of the Census count. Recent experience demonstrates lowered participation in the Census and increased suspicion of government collection of information in general. Particular anxiety exists among non-citizens. There would be little incentive for non-citizens to offer to the government their actual status; the result would be a reduced rate of response overall and an increase in inaccurate responses. Both would frustrate the actual express obligation the Constitution imposes on the U.S. Census Bureau to obtain a count of the whole number of persons in order to apportion House of Representatives seats among the states.

Finally, Appellants' suggestion that voter registration data be used to draw districts is even more flawed. Studies show that the country's voter registration data is often inaccurate and outdated. And its inaccuracy aside, voter registration is, as this Court has already recognized, a fluctuating and political measure, making it generally a poor candidate for protecting a right to equal representation guaranteed by the Constitution.

Adequate data to support Appellants' positions simply do not exist. The district court's judgment should be affirmed.

ARGUMENT

A theory of how to determine equal protection for purposes of the one-person, one-vote principle is only as good as the data upon which it is built. Appellants urge the Court to adopt a constitutional rule that would require states to draw districts that have equal numbers of eligible voters rather than equal numbers of people. But the available data to implement such a requirement simply cannot bear the weight the Constitution requires. Indeed, such a requirement would in practice lead to serious equal protection violations because of the inherent uncertainty and fluctuation currently present in the various measures proposed by Appellants to tally eligible voters.[2] Moreover, there is strong reason to doubt sufficiently precise data could be obtained to ensure Appellants' theory of equal protection would ever be equal in practice.

An overview of the history and legal framework regarding population data aids in understanding the practical difficulties posed by Appellants' position.

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[2] Indeed, as Appellants' own brief demonstrates, there is considerable fluctuation and uncertainty even among the multiple measures Appellant proposes as potential constitutional requirements. *See* Br. of Appellants at 9, 11-12.

I. States Redistrict Based Upon Decennial Census Data that Counts the "Whole Number of Persons" in Each State and There Is No Count of "Citizens" by the Decennial Census.

A. Legal Framework and History of the Census.

The Constitution contains only one explicit requirement regarding the enumeration of population: to properly apportion the number of seats in the House of Representatives among the states, "the whole number of persons in each State," U.S. Const. amend XIV, § 2, must be enumerated "every . . . ten years, in such Manner as [Congress] shall by Law direct," *id.* art. I, § 2.[3]

Since the original decennial Census in 1790, Congress has passed a number of laws regarding the Census.[4] The discretion afforded the Census Bureau to determine the content and methodology of the Census has grown over time. Originally, U.S. Marshals conducting the Census took an oath to obtain "a just

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[3] As historical documents show, this was from the start understood to be a "Census of Inhabitants," without regard to citizenship. *See, e.g.*, Letter from Postmaster General Timothy Pickering to Secretary of State Thomas Jefferson, Dec. 26, 1793, http://founders.archives.gov/documents/Jefferson/01-27-02-0557 (last visited Sept. 23, 2015) (referring to the "Census of Inhabitants").

[4] *See generally* U.S. Census Bureau, Census Instructions, https://www.census.gov/history/www/through_the_decades/census_instructions/ (last visited Sept. 23, 2015) (providing description of congressional authorizations and instructions provided to U.S. Marshals, enumerators, and inhabitants from 1790 to 2010).

and perfect enumeration," *see* Act of Mar. 1, 1790, § 1, 1 Stat. 101. Congress amended this provision in 1810 to require "an actual inquiry at every dwelling-house." Act of Mar. 26, 1810, § 1, 2 Stat. 565-66. The current Census Act, enacted in 1954, also required data be collected by personal visit until it was modified first to permit some non-apportionment data to be obtained through statistical sampling, *see* 13 U.S.C. § 195, and then to repeal the requirement that Census data be obtained through personal visits, and thus permit the Census Bureau to obtain responses through the mail, *see* Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737.

Currently, the only statutorily required data point the Census Bureau must obtain is a "tabulation of total population by States," 13 U.S.C. § 141(b), which is necessary to fulfill the constitutional mandate to apportion based on the "whole numbers of persons," U.S. Const. amend. XIV, § 2; *see Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (holding that Census Act requires actual enumeration data, not sample-based counts, to be used for apportionment purposes). Beyond that, the Secretary of Commerce, acting through the Census Bureau and its directors, is granted wide latitude to conduct the Census "in such form and content as he [or she] may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary." 13 U.S.C. § 141(a).

Exercising the discretion afforded by Congress (and, in turn, conferred upon Congress by the

Constitution), the Census Bureau has, in every Census since 1970, asked only a limited number of questions (known as the "short form") as part of the actual enumeration of every person. These "short form" questions are generally limited to information such as name, age, sex, and race.[5] From 1970 to 2000, the Census Bureau also sent a "long form" to approximately one in every six households.[6] This "long form" was used to collect answers to a wider array of questions, including demographic, economic, social, and housing questions, as well as inquiring about citizenship status.[7] The data gathered through the "long form" sampling was used by local, state, and federal agencies to administer a wide range of government programs. *See Dep't of Commerce*, 525 U.S. at 341 (characterizing the Census as the "linchpin of the federal statistical system" (quotation marks omitted)).

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[5] *See* U.S. Census Bureau, Index of Questions, https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited Sept. 23, 2015).

[6] *See, e.g.*, U.S. Census Bureau, *Summary File 3: 2000 Census of Population & Housing*—Chapter 8: Accuracy of the Data 8-3 (July 2007), https://www.census.gov/prod/cen2000/doc/sf3.pdf. Although the total sample size was one in six households, it was not evenly distributed: a greater percentage of households in rural areas were sampled to increase the reliability of the data estimates in such areas. *Id.*

[7] *See* U.S. Census Bureau, Index of Questions, https://www.census.gov/history/www/through_the_decades/index_of_questions/ (listing long form questions for 1970 to 2000) (last visited Sept. 23, 2015).

Following the 2000 Census, the decennial "long form" was discontinued and was replaced by a continual sampling program called the American Community Survey ("ACS"). ACS collects the same type of information that was included on the long form, but does so on a continuous basis throughout the decade.[8] Each month, about 295,000 addresses are mailed the ACS questionnaire, for a total of 3.5 million households a year, or roughly one in thirty-eight households.[9] The ACS data is then used to generate three sets of estimates, according to the size of the jurisdictions covered: a yearly report for cities and states with over 65,000 people, a three-year report for jurisdictions with over 20,000 people, and a five-year report for all jurisdictions.[10] This practice reflects the small size of the ACS sample compared to the prior decennial long form, and the resultant larger sampling errors. A new version of each report is published every year, with the most recent year's data replacing the oldest year's data in the three- and five-year versions.[11] The smallest geographic unit for which ACS estimates are available

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[8] *See* U.S. Census Bureau, *American Community Survey Information Guide*, http://www.census.gov/acs/www/about_the_survey/acs_information_guide/flipbook/.

[9] *Id.* at 6, 8.

[10] *See* U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data* at 9 (Oct. 2008), https://www.census.gov/content/dam/Census/library/publications/2008/acs/ACSGeneralHandbook.pdf; *see id.* Appendix 1 at A-1-A-2.

[11] *See id.* at 13. For example, if one five-year report aggregates information from 2008 to 2013; the next report will cover 2009 to 2014.

is the Census block group level in the five-year report. Unlike short form counts, ACS estimates are never available at the individual Census block level.[12]

B. States Rely on Census Data to Redistrict.

Understandably, states and municipalities do not generally fulfill their requirement to redistrict congressional, state legislative, and other local districts by conducting their own, separate population counts. Rather, they largely rely on Census data to perform their redistricting obligations. *See Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964). Indeed, the constitutions and laws of a number of states expressly require that decennial Census data be used to redistrict. *See, e.g.*, N.J. Const. art. IV, § 2, ¶ 1 (requiring state senate seats to be apportioned "as nearly as may be according to the *number of their inhabitants* as reported in the last preceding decennial census of the United States" (emphasis added)); Pa. Const. art. 2, § 17(a) (requiring redistricting to occur "each year following the Federal

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[12] *Id.*, Appendix 1 at A-2. The Census Bureau has developed different levels of "statistical geography" to report information. The largest is the Census tract; typically each county will contain several tracts, with each tract having an ideal population of 4,000 (ranging from 1,200 to 8,000). *See* U.S. Census Bureau, *2010 Geographic Terms and Concepts*, https://www.census.gov/geo/reference/terms.html (last visited Sept. 23, 2015). Block groups are clusters of blocks within a tract, and contain between 600 and 3,000 people. *Id.* The lowest level of geography is the individual Census block, which follows physical features (such as the streets bounding a city block) or non-physical features (such as property lines). *Id.*

decennial census"); Ga. Const. art. 3, § 2 (same); Ill. Const. art. 4, § 3(b) (same); Fla. Stat. § 11.031(1) ("All acts of the Florida Legislature based upon population and all constitutional apportionments shall be based upon the last federal decennial statewide census"); Ill. Comp. Stat., ch. 55, § 2-3001c (defining "[p]opulation" for county board redistricting as "the number of inhabitants as determined by the last preceding federal decennial census"); *see also Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (approving the use of decennial Census counts for congressional redistricting, noting that because "the census count represents the best population data available, it is the only basis for good-faith attempts to achieve population equality" (internal quotation marks and citation omitted)).

States and municipalities do, however, generally use their own geographic units—called voter precincts—for purposes of conducting elections in their respective jurisdictions. Each voter precinct is comprised of a number of Census blocks. Congress has facilitated states' reliance on Census data for redistricting by providing that states may submit to the Census Bureau, three years prior to the decennial Census, the geographic boundaries for which they would like Census data to aid them in making redistricting decisions. *See* 13 U.S.C. § 141(c). Thus, states generally provide the Census with voter precinct information, and the Census in turn provides the states with data files that are organized by voter precincts.[13]

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[13] If the Court holds that the Constitution requires states and local governments to use voting age citizens as the measure for the one-person, one-vote principle, nothing in the Constitution or in the

II. Serious Practical Concerns Counsel Against Constitutionally Requiring States to Draw Districts with Equal Numbers of Voting Age Citizens.

A constitutional requirement mandating that states draw legislative districts with equal numbers of voting age citizens would be impossible to accurately implement with currently available data. Moreover, for several reasons, it would be difficult to obtain an accurate actual count, even were one attempted.

A. ACS Citizenship Estimates Cannot Provide the Basis For a Constitutional Equal Protection Rule.

The actual number of voting age citizens in each state is unknown. The only information in existence is ACS's statistical sample-based estimates. In some circumstances, statistical sampling can be preferable to an actual count. *See Dep't of Commerce*, 525 U.S. at 322-23 ("Some identifiable groups—including certain minorities, children, and renters—have historically had substantially higher undercount rates than the population as a whole."); *id.* at 354 ("[U]nadjusted headcounts are also subject to error or bias—the very fact that creates the need for a statistical supplement") (Breyer, J., concurring in part, dissenting in part). But

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current Census Act would require the Census Bureau to provide this information to states and local governments. Rather, the Court would be requiring states and local governments to obtain this information on their own, in the process abrogating the many state constitutional and statutory provisions linking the state process to the federal Census data.

the ACS was not designed to provide data to support a constitutional right to districts with equal numbers of voting age citizens.

1. The ACS Estimates Do Not Align with the Timing of Redistricting.

As an initial matter, the ACS estimates do not align with the timing of congressional apportionment or traditional legislative apportionment. States traditionally redistrict their state legislative districts at the same time as their congressional districts, using the same decennial Census count that triggered the congressional reapportionment. States thus use the Census count to create population equality among and within the states measured by a single, consistent snapshot in time that persists for the decade. As this Court explained in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), *superseded by statute on other grounds as stated in Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015):

> When the decennial census numbers are released, States must account for any changes or shifts in population. But before the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned. After the new enumeration, no districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years. And if the State has not redistricted in response to the new census figures, a federal court will ensure that the districts comply with the one-person, one-vote mandate before the next election.

Id. at 488 n.2. This "legal fiction" is "necessary to avoid constant redistricting, with accompanying costs and instability." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 421 (2006) (opinion of Kennedy, J., joined by Souter, J., and Ginsburg, J.).

Using the ACS voting age citizen estimates would unsettle this system. To begin, only the five-year information could be used because the one- and three-year reports are not statistically reliable at the small geographic units used to draw district boundaries. *See supra* Part I. This poses several problems that seriously undermine the ACS's utility for redistricting.

First, with respect to the ACS five-year survey, eighty percent of the data is already between two and five years old at the time of redistricting. In contrast, redistricting occurs as soon as the population counts currently used by states is released by the Census Bureau. To illustrate, if ACS estimates were used instead of the total population count, a state redistricting in 2021 would be using aggregated estimates spanning from 2015 to 2020. Because the map drawn in 2021 would govern elections through the decade, by 2030, forty percent of the underlying aggregated estimates will be from questionnaires answered fourteen or fifteen years prior. The ACS estimates are therefore a more stale source of information than the total population count currently relied upon by the states.

Second, because the ACS estimates contain five years of sampling, and the age information is not adjusted each year to reflect the passage of a year, many respondents who were between the ages of

thirteen and seventeen when their responses were recorded will continue to be excluded from the *voting age* citizen count at the time the estimates are used to draw district lines, despite the fact that they are in fact eighteen or older at that time. *See* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 777 (2011). This problem is exacerbated, as discussed above, by the fact that district lines remain in place for a decade, meaning that at the end of the redistricting cycle, a thirty-two-year-old person is not "counted" as a voting age person in their district if she was seventeen when first surveyed.

Third, the share of minorities among people under the age of eighteen greatly exceeds their share of the total population.[14] As a result, areas with larger minority populations will be disproportionately affected by the use of ACS estimates that are not annually updated to reflect the actual age of respondents at the time the report is released, thus undercounting "eligible voters" among minority communities and therefore overpopulating minority legislative districts.

Together, these issues would result in outdated information governing district lines and entrenched undercounting of young voters, disproportionately affecting minority populations. For these reasons, the

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[14] *See* Sandra L. Colby & Jennifer M. Ortman, U.S. Census Bureau, *Projections of the Size and Composition of the U.S. Population: 2014 to 2016* 10-11 (Mar. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf.

use of five-year-old ACS estimates cannot support the constitutional one-person, one-vote requirement.

2. ACS Estimates Are Not Available at the Smallest Geographic Levels, and Some Data is Suppressed to Protect Privacy.

An additional problem is that ACS estimates are not available at the smallest geographical level that is actually used for purposes of redistricting—the Census block. The smallest geographic level at which ACS estimates can accurately be utilized is the block group level. *See Persily*, 32 Cardozo L. Rev. at 777. This would pose significant problem for states seeking to evenly populate districts. "In order to achieve the lowest possible levels of deviation within state legislative and congressional plans, state technicians have repeatedly advised the Census Bureau that they need decennial counts by small-area geography such as voting districts and census blocks."[15] States need data at granular levels in order to make a good-faith effort to equalize population to the extent possible among districts. *See Karcher*, 462 U.S. at 730 (requiring that, for congressional redistricting, states "make a good-faith effort to achieve precise mathematical equality" (quotation marks omitted)); *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (noting that the Court has permitted "minor deviations from mathematical equality among state legislative districts" (quotation marks omitted)). Without the granular Census block

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[15] Catherine McCully, U.S. Census Bureau, *Designing P.L. 94-171 Redistricting Data for the Year 2020 Census* 7-8 (Dec. 2014), http://www.census.gov/content/dam/Census/library/publications/2014/rdo/pl94-171.pdf.

data typically used to balance population between and among districts, states relying upon ACS voting age citizen estimates likely will be unable to satisfy the standard this Court requires for legislative redistricting.

Moreover, even at the block group level, there are a number of geographical areas where there are too few people to permit the Census Bureau to even release estimates without jeopardizing privacy. Congress has mandated that Census data may only be used for "the statistical purpose for which it is supplied," 13 U.S.C. § 9(a)(1), and that the Census Bureau may not "make any publication whereby the data furnished by any particular . . . individual . . . can be identified," *id.* § 9(a)(2). As a result, the Census Bureau suppresses certain estimates that could be linked to identifiable persons in light of the small geographic size of the reporting area.[16]

States depend upon population counts being reported at small geographic units to permit districts to be built that meet the constitutional requirement for equal distribution of population. In addition, having decennial Census counts available at small geographic units makes it easier to follow voter precinct lines or other political subdivision lines, such as city boundaries, particularly where those lines have recently changed by annexations or precinct splits. The ACS voting age citizen estimates are not reported—and in some cases

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[16] *See* U.S. Census Bureau, *American Community Survey: Data Suppression* 2, 7 (Nov. 15, 2013), http://www2.census.gov/programs-surveys/acs/tech_docs/data_suppression/ACSO_Data_Suppression.pdf.

are statutorily prohibited from being reported—at the Census block level. The ACS estimates thus cannot meet the needs of states for redistricting purposes.

3. As a Statistical Sample, ACS Estimates Are Subject to Error That Makes their Use for Line-Drawing Difficult.

As with any survey, the ACS estimates are subject to non-sampling errors (*e.g.*, errors in data coding) and sampling errors (*e.g.*, the chosen sample is non-representative of the actual community).[17] The ACS reports margins of error at the ninety percent confidence level.[18] For example, if the ACS estimates reported that a county had 10,000 citizens over the age of eighteen, with a five percent relative error, nine times out of ten (ninety percent of the time) one could be confident that the actual citizen voting age population of the county was between 9,500 and 10,500.

The margin of error grows as the sample size decreases, so the smaller the area, the higher the possibility of error. This could become a significant issue because redistricting decisions are often made on the margins, using very small geographic units to

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[17] *See* U.S. Census Bureau, *American Community Survey Design and Methodology (January 2014)*—Chapter 15: Improving Data Quality by Reducing Non-Sampling Error, at 1 (Jan. 30, 2014), http://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_ch15_2014.pdf.

[18] U.S. Census Bureau, *Glossary: Confidence interval (American Community Survey*, https://www.census.gov/glossary/#term_ConfidenceintervalAmericanCommunitySurvey (last visited Sept. 23, 2015).

surgically move populations in and out of districts to satisfy the one-person, one-vote requirement. And, as discussed above, the smallest unit—the Census block—is not available with ACS estimates because of sample size limitations.

Take for example Titus County, Texas, where Appellant Sue Evenwel resides. *See* Br. of Appellants at 10. Titus County has eight Census tracts, each with between two and four Census block groups, for a total of twenty-two block groups—the smallest level of geography reported by the ACS. The relative error for the ACS's estimates of voting age citizens for the Titus County block groups range from a low of 14.1 percent to a high of 36.6 percent. Figure 1 below shows the estimates by block group for Titus County.

Figure 1: Titus County, Texas CVAP Estimates with Absolute and Relative Error by Block Group (2009-2013)

Block Group	Est. CVAP with Absolute and Relative Error	Block Group	Est. CVAP with Absolute and Relative Error
9501: #1	1,045 ±213 (20.4%)	9505: #1	640 ±153 (23.9%)
9501: #2	485 ±148 (30.5%)	9505: #2	560 ±149 (26.6%)
9502: #1	895 ±162 (18.1%)	9506: #1	750 ±197 (26.3%)
9502: #2	680 ±116 (17.1%)	9506: #2	825 ±192 (23.3%)
9503: #1	1,445 ±236 (16.3%)	9506: #3	615 ±154 (25.0%)
9503: #2	905 ±204 (22.5%)	9507: #1	325 ±90 (27.7%)
9503: #3	1,870 ±263 (14.1%)	9507: #2	315 ±114 (36.2%)
9503: #4	540 ±177 (32.8%)	9508: #1	655 ±240 (36.6%)
9504: #1	1,360 ±264 (19.4%)	9508: #2	575 ±178 (31.0%)
9504: #2	2,020 ±301 (14.9%)	9508: #3	815 ±193 (23.7%)
9504: #3	850 ±210 (24.7%)	9508: #4	330 ±111 (33.6%)

As Figure 1 shows, even if redistricters could conceivably rely upon block groups to move areas

among districts to properly draw boundaries, they would contend with relatively large error margins. For example, if an adjoining district needed to be increased by 330 voting age citizens, Block Group 4 of Census Tract 9508 would be considered. But the most that can be said is that nine times out of ten, one could be confident that there were between 219 and 441 voting age citizens in that area—a 33.6 percent relative error.

The error margins are still relatively high at the next largest geographic unit, the Census tract, as illustrated by Figure 2 below.

Figure 2: Titus County, Texas CVAP Estimates and Error Margins by Census Tract

Census Tract	Est. CVAP	Absolute Error	90% Confidence Range	Relative Error
9501	1,530	± 210	1,320 – 1,740	13.7%
9502	1,570	± 180	1,390 – 1,750	11.5%
9503	4,755	± 297	4,458 – 5,052	6.2%
9504	4,230	± 297	3,933 – 4,527	7.0%
9505	1,200	± 182	1,018 – 1,382	15.2%
9506	2,190	± 217	1,973 – 2,407	9.9%
9507	635	± 123	512 – 758	19.4%
9508	2,375	± 237	2,138 – 2,612	10.0%

The relative error ranges from 6.2 to 19.4 percent for the Titus County Census tracts. So, if redistricters needed to move 635 people to a neighboring district, tract 9507 would be an obvious candidate, but using ACS estimates, the most they could know is that nine

times out of ten, it would contain between 512 and 758 citizens of voting age.[19]

All of these issues together—the timing issues, the unavailability of estimates at the block level typically used by redistricters, the unavailability of certain estimates because of privacy concerns, and the error margins combine to make the ACS voting age citizen estimates an inappropriate source to support the constitutional one-person, one-vote right.

This is not to say the ACS estimates are inappropriate for other uses. Because it is the only citizenship information that exists, where courts require citizenship information to support legal claims, as some have for cases under Section 2 of the Voting Rights Act, *see, e.g., Valdespino v. Alamo Heights Independent School District*, 168 F.3d 848, 853 (5th Cir. 1999), it is the "best population data available," *Karcher*, 462 U.S. at 738 (quotation marks omitted). It is one thing to use less than perfect data when it is the only data available to meet a statutory evidentiary burden; it is quite another to create and impose a new constitutional rule that must necessarily be built upon that data.

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[19] Data for both Figures 1 and 2 is taken from U.S. Census Bureau, Redistricting Data, *Voting Age Population by Citizen and Race (CVAP), 2009-2013 American Community Survey 5 Year Estimates*, https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last visited Sept. 23, 2015).

B. Asking Citizenship Status of Every Household Would Lead to Reduced Response Rates and Inaccurate Responses, While Multiplying Privacy and Government Intrusion Fears.

Directly inquiring about citizenship status as part of the short form Census is not a solution to the data problem posed by Appellants' legal theory. Doing so would likely exacerbate privacy concerns and lead to inaccurate responses from non-citizens worried about a government record of their immigration status.

During the past two decades, the Census Bureau has had to contend with significantly increased distrust, based on concerns about government intrusion and privacy. When the 2000 Census was taken, controversy erupted over the Census questions, with congressional leaders and others calling on people to disregard questions they found intrusive.[20] In one survey, 71 percent of respondents said that intrusive questions should go unanswered.[21] This problem continued with the 2010 Census—between 2009 and 2010, one survey showed the Census Bureau dropped in its "trust" rating from 75 percent to 39 percent.[22] One

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[20] Kenneth Prewitt, *What if We Give a Census and No One Comes?*, 304 Sci. Mag. 1452 (June 4, 2004).

[21] *Id.*

[22] Andy Greenberg, *Census Paranoia Fueled Distrust in Government Privacy More than NSA Wiretapping*, Forbes, June 30, 2010, http://www.forbes.com/sites/firewall/2010/06/30/census-paranoia-fueled-distrust-in-government-privacy-more-than-nsa-wiretapping/.

Congresswoman publicly proclaimed that her family "will only be indicating the number of people in the household, because 'the Constitution doesn't require any information beyond that.'"[23]

A mandatory inquiry into citizenship status is all the more likely to engender privacy concerns, particularly among non-citizens. "The nuanced reasons for the question . . . will of course be lost to millions upon millions of Americans. The question will be viewed with suspicion."[24] "[I]t is foolish to expect that census-taking is immune from anxieties that surround such issues as undocumented aliens, immigration enforcement, terrorism prevention, national identity cards, total information awareness, and sharp increases in surveillance generally."[25]

In addition to both citizens and non-citizens simply not responding, "[n]on-citizens, mistrustful of the government's promise that their answers to a census question can never be used against them, will misrepresent themselves on the census form."[26]

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[23] Prerana Swami, *Rep. Bachmann Refuses to Fill out 2010 Census*, CBS News (June 18, 2009), http://www.cbsnews.com/news/rep-bachmann-refuses-to-fill-out-2010-census/.

[24] *Counting the Vote: Should Only U.S. Citizens be Included in Apportioning Our Elected Representatives?: Hearing Before Subcomm. on Federalism and the Census of the H. Comm. on Gov't Reform*, 109th Cong. 77 (2005) (Statement of Kenneth Prewitt).

[25] *Id.* at 78.

[26] *Id.*

The sum effect would be bad Census data. And any effort to correct for the data would be futile.

> The Census Bureau cannot become a quasi-investigatory agency and still perform its basic responsibilities as a statistical agency. Responses to a citizenship question cannot be validated on a case-by-case basis. Although the bureau may devise ways to estimate the magnitude of misrepresentation in responses to a citizenship question at the national level, such an estimate would not likely be robust enough to be used in state-level counts—let alone at the smaller levels of geography relevant to congressional districting, state legislatures, and local government.[27]

Finally, because a one-by-one citizenship inquiry would invariably lead to a lower response rate to the Census in general, such an inquiry would seriously frustrate the the Census Bureau's ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats among the states. *See* U.S. Const. art. II, § 1; *id.* amend XIV, § 2.[28]

Neither existing data estimates nor a potential actual count can reliably permit states to draw districts

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[27] *Id.*

[28] Appellants offer no explanation for how it could be that the Fourteenth Amendment *forbids* Texas from apportioning seats within the state in the same manner the Fourteenth Amendment *requires* seats to be apportioned among the states.

with equal numbers of voting age citizens. As a result, voting age citizen data cannot plausibly serve as a constitutionally-mandated metric for defining the one-person, one-vote principle.

III. Voter Registration Data Would Be an Inappropriate Measure Upon Which to Require Districts To Be Drawn.

Appellants' alternative measure—voter registration data—is also an inappropriate measure by which to require states to draw districts. The data is often inaccurate and unreliable, it is prone to dramatic changes, and it is generally available only at the voting precinct level, not at the smaller Census block level at which states generally draw districts.

Although this Court has before *permitted* a state to draw districts based on voter registration data, it did so only for an interim districting plan with assurances that the data in the particular case did not vary from other population measures. In so doing, the Court expressed considerable doubts about the use of this data, stating:

> Use of a registered voter or actual voter basis . . . depends . . . upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment. Moreover, fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly

> controversial election issue, a particularly popular candidate, or even weather conditions.

Burns v. Richardson, 384 U.S. 73, 92-93 (1966) (internal quotation marks omitted) (footnotes omitted). These problems have not changed since 1966 when *Burns* was decided.

A 2012 study by the Pew Charitable Trust found that approximately 24 million voter registration records in the United States—1 in 8—are invalid or inaccurate, including 12 million with incorrect addresses, suggesting voters had moved or the addresses were otherwise incorrect.[29] The study also found 1.8 million deceased still registered, and 2.75 million voters registered in more than one state.[30]

Beyond the inaccuracy of voter registration data, state registration data simply is not available at the Census block level. Rather, the smallest geographic unit at which voter registration data is available is the voter precinct level. Thus, redistricters would not be able to move particular Census blocks from district to district and would instead be limited to moving precincts. These geographic areas are generally too large to accurately draw districts with substantially equal populations.

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[29] Pew Charitable Trust, *Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* 3-4 (Feb. 2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PewUpgradingVoterRegistrationpdf.pdf.

[30] *Id.* at 4.

In light of the serious flaws in voter registration data, it would in most instances be a violation of equal protection for this metric to be used, contrary to Appellants' argument that the Constitution actually should require it.[31]

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

Respectfully submitted,

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[31] The "Non-Suspense Voter Registration" metric offered by Appellants is equally flawed—it adds additional potential error related to mailing of notices. *See* Br. of Appellants at 9.